SUPREME COURT, U. S.

APR 24 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1358

PAUL DE LUCIA,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JACK WASSERMAN
Warner Building
Washington, D.C.
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES AND REGULATIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING CERTIORARI 6
CONCLUSION 8

CITATIONS

Cases:

De Lucia v. Flagg, 297 F.2d 58 (7th Cir., 1961), cert. denied 369 U.S. 837 4

De Lucia v. Immigration and Naturalization Service, 370 F.2d 305 (7th Cir., 1966), cert. denied 386 U.S. 916 4

Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) 6, 8

Kwok v. Immigration and Naturalization Service, 381 F.2d 542 (3rd Cir., 1967), cert. granted 390 U.S. 918, No. 638, October Term, 1967 7

Mendez v. Major, 340 F.2d 128 (8th Cir., 1965) 7

Mui v. Esperdy, 371 F.2d 772 (2nd Cir., 1966), cert. denied 386 U.S. 916 6

Salama v. Immigration and Naturalization Service, 336 F.2d 7 (5th Cir., 1964) 7

Skiftos v. Immigration and Naturalization Service, 332 F.2d 203 (7th Cir., 1964) 6

Talavera v. Pederson, 334 F.2d 52 (6th Cir., 1964) 6

United States v. De Lucia, 256 F.2d 487 (7th Cir., 1958), cert. denied 358 U.S. 836 3

U.S. ex rel. Scala De Felice v. Shaughnessy, 114 F.Supp. 791 (S.D. N.Y., 1953) 4

Yamada v. Immigration and Naturalization Service, 384 F.2d 216 (9th Cir., 1967) 7

Statutes and Regulations:

8 Code of Federal Regulations, Sec. 242.20 (1967 Supp.) 3

H. Doc. 329, 84th Cong., 2nd Sess. 7

H. R. 13311, 85th Cong., 2nd Sess. 7

Hearings on H.R. 13311, 85th Cong., 2nd Sess., p. 23 7

Immigration and Nationality Act:

Section 106(a) [8 U.S.C. 1105a(a)] 2
Section 242(b) [8 U.S.C. 1252(b)] 3
Section 242(c) [8 U.S.C. 1252(c)] 8
Section 242(d) [8 U.S.C. 1252(d)] 8
Section 242(e) [8 U.S.C. 1252(e)] 8
Section 242(f) [8 U.S.C. 1252(f)] 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

PAUL DE LUCIA,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Paul De Lucia, by his attorney, petitions for a writ of certiorari to review a judgment of the Court of Appeals for the District of Columbia Circuit filed on March 21, 1968, affirming an order of the District Court dismissing the action herein for lack of jurisdiction.

OPINIONS BELOW

The District Court rendered no opinion. Its order is set forth in Appendix A. The Opinion of the Court of Appeals

dated March 21, 1968, is not yet reported and is set forth in Appendix B (R. 2).

JURISDICTION

The judgment of the Court below, Appendix C (R. 3) is dated and was entered on March 21, 1968. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether determinations made by a District Director of the Immigration and Naturalization Service on June 20, 1964 (prior to the final order of deportation herein) and thereafter, not in the deportation hearing conducted under 8 U.S.C. 1252(b), are controlled by 8 U.S.C. 1105a(a) and are initially reviewable exclusively in a Court of Appeals.

2. Whether the District Court for the District of Columbia lacks jurisdiction to review administrative determinations that petitioner is an Italian citizen made by the District Director of the Immigration and Naturalization Service at Chicago acting for the Attorney General.

3. Whether administrative decisions of the District Director of the Immigration and Naturalization Service at Chicago, decisions of an official who lacks power to enter orders of deportation, are considered final orders of deportation initially reviewable exclusively in the Court of Appeals.

STATUTES AND REGULATIONS INVOLVED

Section 106(a) of the Immigration and Nationality Act [8 U.S.C. 1105a(a)] provides in part:

> "The procedure prescribed by and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031, et seq.) shall apply to and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act * * *."

Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] provides in part:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien * * *."

8 C.F.R. 242.20 (1967 Supp.) provides:

> "The order of the special inquiry officer shall be final except when the case is certified to the Board as provided in Part 3 of this chapter, or an appeal is taken to the Board by the respondent or the trial attorney."

8. C.F.R. 243.1 (1967 Supp.) provides:

> "Final order of deportation.
>
> "Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in proceedings under Part 242 of this chapter shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time alloted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision."

STATEMENT OF THE CASE

Petitioner is a 69 year old native of Italy who came to the United States illegally and without proper documents in 1920. He was naturalized as an American citizen in 1928 (JA 2).* In 1957 he was denaturalized, *United States v. De Lucia,* 256 F.2d 487 (7th Cir., 1958), cert. denied 358 U.S. 836.

---

*References designated JA are to the Joint Appendix (R. 1).

By decision of the Board of Immigration Appeals dated April 12, 1966, he was ordered deported. This decision was upheld on review. *De Lucia v. Immigration and Naturalization Service,* 370 F.2d 305 (7th Cir., 1966), cert. denied 386 U.S. 916.[1]

In the deportation proceedings conducted under Section 242(b) of the Immigration and Nationality Act [8 U.S.C. 1252(b)] no finding was made as to petitioner's citizenship (JA 19). The judicial review action in the Seventh Circuit likewise left the issue of petitioner's present citizenship or statelessness open (JA 20).

However, *ex parte and apart from the deportation proceeding conducted under 8 U.S.C. 1252(b),* the District Director of the Immigration Service in Chicago had incorrectly and improperly determined that De Lucia was a citizen of Italy. On June 20, 1964, the District Director advised the Italian authorities (JA 16) on printed Immigration and Naturalization Form I-217, Item 4 (JA 15) that De Lucia's citizenship was "Italian". Again on April 21, 1966, the same day that the petitioner was finally ordered deported by the Board of Immigration Appeals (JA 20), the Chicago District Director advised the Consul of the United Kingdom in Chicago that petitioner's present nationality was Italian (JA 23). Petitioner had designated England, pursuant to 8 U.S.C. 1253, as his choice of a place of deportation (JA 7).[2]

---

[1] The Seventh Circuit distinguished between the order of deportation and its execution, stating "we are here concerned only with the validity of the deportation order and not with its execution", 370 F.2d 305 at 309. For the prior history of the deportation case, see *De Lucia v. Flagg,* 297 F.2d 58 (7th Cir., 1961), cert. denied 369 U.S. 837.

[2] The failure of the respondent to supply the country designated by petitioner with true, full or complete information deprives him of his rights under the deportation statute and vitiates the subsequent designation by the Attorney General of a place of deportation. *U.S. ex rel. Scala Di Felice v. Shaughnessy,* 141 F.Supp. 791 (S.D. N.Y., 1953).

This litigation was instituted on February 23, 1967, in the District Court for the District of Columbia against the Attorney General, seeking a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and under the Administrative Procedure Act (5 U.S.C. 1009)[3] for a judgment "declaring that plaintiff is not a citizen of Italy and is stateless" and "restraining defendant and his agents from representing that plaintiff is a citizen of Italy" (Appendix D, R. 3).

Six days later, on March 1, 1967, respondent advised the United Kingdom that petitioner "claims statelessness" (JA 14). At no time has respondent acknowledged that petitioner has lost his Italian citizenship or that he is stateless. No attempt has been made to correct the incorrect assertion by respondent to the Italian authorities that petitioner is an Italian citizen.[4]

Respondent contended in the District Court that "at no time has defendant made a determination that plaintiff is a national or citizen of Italy". Respondent further stated that "In seeking travel documents from Italy, at earlier stages of the proceeding, defendant expressed the opinion that plaintiff was a citizen of Italy, which represented his opinion and belief." It was further represented by respondent that in future dealings with Italy it would be stated that petitioner claims statelessness (JA 11, par. 19).

---

[3] Recodified by Public Law 89-554, 80 Stat. 378, 392 as 5 U.S.C. 706.

[4] Prior to the institution of this litigation, and on April 27, 1966, the Italian travel document issued on June 29, 1964, and in the possession of respondent was ordered suspended in Rome by the Italian Jurisdictional State Council.

Subsequent to the institution of this litigation and on March 20, 1967, the Civil Tribunal of Rome, First Section, decided that petitioner is not an Italian citizen. It is obvious from the foregoing that respondent cannot assert here its stereotype and familiar claim that this lawsuit is for the purpose of delay.

Petitioner moved in the District Court for injunctive relief and summary judgment (JA 1). Upon the basis of *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1963), respondent moved and secured a dismissal of the complaint for lack of jurisdiction (R. 25). The Court of Appeals affirmed, stating that (R. 2):

> "The act by the Chicago District Director which appellant seeks to review is clearly subject to the limitation on judicial review of § 106(a) and can only be considered by the Court of Appeals for the Seventh Circuit."

REASONS FOR GRANTING CERTIORARI

The jurisdictional issue presented in the instant case is one of recurring importance in the cases of aliens seeking judicial review of determinations by the Immigration and Naturalization Service. It has resulted in conflicting decisions by the Circuit Courts of Appeal. The problem is presently before this Court in *Kwok v. Immigration and Naturalization Service* (No. 638, October Term, 1967, cert. granted 390 U.S. 918).

The determinations and assertions by the District Director of the Immigration and Naturalization Service on June 20, 1964, (JA 16) and on April 21, 1966 (JA 23), both before and at the time of the final order of deportation herein, that petitioner is an Italian citizen were not "final orders of deportation * * * pursuant to administrative proceedings under Section 242(b) [8 U.S.C. 1252(b)]" and exclusive initial jurisdiction was not vested in the Court of Appeals to review such determinations. The decision below is contrary to the views of the Second, Third, Fifth, Eighth and Ninth Circuits.[5] *Mui v. Esperdy*, 371 F.2d 772, 776-7 (2nd

[5]The decision below conforms to the views of the Sixth and Seventh Circuits. *Talavera v. Pederson*, 334 F.2d 52 (6th Cir., 1964); and *Skiftos v. Immigration and Naturalization Service*, 332 F.2d 203 (7th Cir., 1964). For a criticism of the views of the Seventh Circuit, see the Government's brief, pp. 48-9, Note 28, in *Foti v. Immigration and Naturalization Service*, Sup. Ct. Oct. 1963 Term, No. 28.

Cir., 1966), cert. denied 386 U.S. 916; *Kwok v. Immigration and Naturalization Service,* 381 F.2d 542 (3rd Cir., 1967), cert. granted 390 U.S. 918, No. 638, October Term, 1967; *Salama v. Immigration and Naturalization Service,* 336 F.2d 7 (5th Cir., 1964); *Mendez v. Major,* 340 F.2d 128 (8th Cir., 1965); *Yamada v. Immigration and Naturalization Service,* 384 F.2d 216 (9th Cir., 1967).

Before it changed its mind, the Government espoused the view urged by petitioner. It found no ambiguity in the statute sponsored and approved by the Department of Justice.[6] In its brief before this Court in *Foti v. Immigration and Naturalization Service,* October Term, 1963, No. 28, page 48, the Solicitor General said:

> "Section 106(a) limits the grant of authority therein contained to the judicial review of 'all final orders of deportation * * * made * * * pursuant to administrative proceedings under Section 242(b) * * *.' Concededly, if these words are to be followed faithfully, it is difficult to see how the section can be construed to extend to a determination made *subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation."

The determination of Italian citizenship herein was made by the Chicago District Director of the Immigration and Naturalization Service who lacks power to enter an order of deportation. It was not made in the deportation proceeding conducted under 8 U.S.C. 1252(b). Section 106(a), 8

---

[6] On February 8, 1956, President Eisenhower called for the legislation. (H. Doc. 329, 84th Cong., 2nd Sess.) and the initial draft of the bill was transmitted to Congress by Attorney General Rogers on the same day. The final version of the bill, H.R. 13311 (85th Cong., 2nd Sess.) was endorsed by the Department of Justice. (House Hearings on H.R. 13311, July 10, 1958, p. 23.)

U.S.C. 1105a(a) confines exclusive initial judicial review to the Court of Appeals only in cases of "final orders of deportation * * * pursuant to administrative proceedings under Section 242(b) [8 U.S.C. 1252(b)]". The administrative determinations herein were of Italian citizenship. They were not final orders of deportation.[7] They were not made pursuant to administrative proceedings under 8 U.S.C. 1252(b). The District Court has jurisdiction and the dismissal of the complaint upon the authority of *Foti v. Immigration and Naturalization Service*, 375 U.S. 217 (1964), was erroneous.

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

JACK WASSERMAN
Warner Building
Washington, D.C.
Attorney for Petitioner

---

[7]The term "final orders of deportation" has a well accepted meaning. It appears frequently in the immigration statute, 8 U.S.C. 1252(b), (c), (d), (e), (f) and is defined by regulation, 8 C.F.R. 243.1 (1967 Supp.). It has never encompassed determinations made outside the deportation hearing.

APPENDIX A

ORDER

[Filed April 21, 1967, U.S. District Court,
District of Columbia, Civil Action
No. 422-67]

This cause having come before the Court on defendant's motion to dismiss or for summary judgment; and on plaintiff's cross-motion for summary judgment; and on plaintiff's motion for preliminary injunction and defendant's opposition thereto; and the Court having heard oral argument.

It is this 21st day of April, 1967,

ORDERED, ADJUDGED and DECREED that the action is hereby dismissed for lack of jurisdiction.

JOSEPH C. McGARRAGHY
United States District Judge

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030

PAUL De LUCIA,
Appellant

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Appellee

Appeal from the United States District Court
for the District of Columbia

Decided March 21, 1968

Mr. Jack Wasserman, with whom *Mr. David Carliner* was on the brief, for appellant.

Mr. Charles Gordon, General Counsel, Immigration and Naturalization Service, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court, with whom *Messrs. David G. Bress*, United States Attorney, and *Frank Q. Nebeker*, Assistant United States Attorney, were on the brief, for appellee.

Before EDGERTON, *Senior Circuit Judge*, and TAMM and ROBINSON, *Circuit Judges*.

EDGERTON, *Senior Circuit Judge:* This is an appeal from an order entered by the District Court dismissing an action for lack of jurisdiction. Appellant seeks review of statements by the Chicago District Director of the Immigration and Naturalization Service that appellant is an Italian citizen and a declaratory judgment that he is stateless. We agree that the District Court lacks jurisdiction and affirm.

Appellant has extensively litigated the matter of the revocation of his citizenship, *United States* v. *De Lucia*, 256 F.2d 487 (7th Cir.), *cert. denied*, 358 U.S. 836 (1958); and the deportation order, *De Lucia* v. *Flagg*, 297 F.2d 58 (7th Cir. 1961), *cert. denied*, 369 U.S. 837 (1962). While subsequent habeas corpus proceedings were pending, the parties agreed to remand the matter to the administrative authorities solely to enable appellant to seek any discretionary relief to which he thought himself entitled and to have the special inquiry officer designate the country to which he would be deported. The special inquiry officer denied discretionary relief. The Board of Immigration Appeals affirmed. So also did the Seventh Circuit. *De Lucia* v. *Immigration and Naturalization Service*, 370 F.2d 305 (7th Cir. 1966). Again the Supreme Court denied *certiorari*. 386 U.S. 912 (1967).

During these latter proceedings the questions of appellant's alleged statelessness and of the designation of Italy as a country of deportation were considered. Thus, it is clear that his present claim is only colorably directed at the ministerial act of the Chicago District Director in stating that appellant is a citizen of Italy. Appellant's apparent purpose is again to challenge his deportation order.

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1105a(a) provides for exclusive review in the appropriate circuit court of "final orders of deportation . . . pursuant to administrative proceedings under section 242(b)."

The scope of § 106(a) was discussed by the Supreme Court in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217 (1963), in which the Court said at 229: "Also, it seems

rather clear that all determinations made during and incidental to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals . . . are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a)." See also *Giova* v. *Rosenberg*, 379 U.S. 18 (1964); *Attorney General* v. *Bufalino*, 125 U.S.App.D.C. 273, 371 F.2d 378 (1966).

Thus, the act by the Chicago District Director which appellant seeks to review is clearly subject to the limitation on judicial review of § 106(a) and can only be considered by the Court of Appeals for the Seventh Circuit.

Affirmed.

APPENDIX C

[Filed March 21 1968.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,030 September Term, 1967.

Paul De Lucia Civil 422-67
Appellant

v.

Attorney General of
the United States,
Appellee

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Senior Circuit Judge, and Tamm and Robinson, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Senior Circuit Judge
Edgerton

Dated: March 21, 1968

APPENDIX D

COMPLAINT
(Action for Declaratory Judgment)

[Filed February 23, 1967, U.S. District Court, District of Columbia, Civil Action No. 422-67]

The plaintiff, Paul De Lucia, respectfully alleges:

This is an action for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) for review under 28 U.S.C. 1361, and for review under the Administrative Procedure Act (5 U.S.C. 1009).

2. The plaintiff was born in Italy in 1897, came to the United States in 1920 and has been here ever since.

3. The defendant is the Attorney General of the United States and is charged with the statutory duty to enforce the immigration and deportation laws of the United States and to determine the citizenship of aliens within the United States.

4. In 1928 plaintiff was naturalized as an American citizen.

5. Upon plaintiff's naturalization as an American citizen, he lost his Italian citizenship under Italian law.

6. In 1957 plaintiff was denaturalized and deprived of his American citizenship.

7. Upon plaintiff's denaturalization he did not regain his Italian citizenship but became stateless.

8. Defendant, through his agents, has made an *ex parte* determination that plaintiff is presently a citizen of Italy.

9. Defendant, through his agents, has represented to officials of the Government of England that plaintiff is a citizen of Italy.

10. Defendant, through his agents, has represented to officials of the Government of Italy that plaintiff is a citizen of Italy.

11. The aforesaid representations that plaintiff is a citizen of Italy are false and untrue.

12. The defendant, through his agents, is seeking to deport plaintiff and has secured a refusal by England to accept plaintiff as a deportee upon the representation that plaintiff is a citizen of Italy.

13. Plaintiff's deportation has been directed to England and upon England's refusal, deportation is to be effectuated to Italy.

14. Defendant's *ex parte* determination that plaintiff is a citizen of Italy is without legal or factual foundation, is improper and illegal and is causing plaintiff irreparable damage.

WHEREFORE, Plaintiff prays for a judgment:

(a) Declaring that plaintiff is not a citizen of Italy and is stateless.

(b) Declaring that defendant's *ex parte* ruling that plaintiff is an Italian citizen is null and void.

(c) Restraining defendant and his agents from representing that plaintiff is a citizen of Italy.

(d) For such other and further relief as may be appropriate.

JACK WASSERMAN
DAVID CARLINER
902 Warner Building
Washington, D.C.
Attorneys for Plaintiff